

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 243
3135884

BETWEEN TING HE
 Applicant

AND CHEERTOP TRADING
 LIMITED
 Respondent

Member of Authority: Rowan Anderson

Representatives: May Moncur, advocate for the Applicant
 Alan Chug for the Respondent

Investigation Meeting: 15 September 2022 at Auckland, and 17 October 2023
 by video

Submissions received: At the investigation meeting and 28 October 2022 and
 from Applicant
 15 November 2022 from Respondent

Determination: 16 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ting (Terry) He was employed by Cheertop Trading Limited (Cheertop), a food wholesaler, as a delivery driver/warehouse assistant. Mr He commenced his employment on 4 June 2019.

[2] Mr He claims that he was unjustifiably dismissed when his employment was terminated by reason of redundancy in June 2020. He also claims that he was unjustifiably disadvantaged in that he was issued a formal warning by Cheertop relating to an absence from work in May 2020.

[3] In addition, Mr He makes three other claims relating to the payment of wages during his employment. First, he says that he was entitled to payment of 40 hours per week, but that during his employment he was not in fact paid for those hours. Second, Mr He claims that his hours of work were unilaterally reduced by a change from five days per week to three days per week. Finally, Mr He claims that a decision was made by Cheertop, without his agreement, in March 2020 to reduce his wages to 80 percent of his ordinary rate in response to the COVID-19 Pandemic and lockdowns.

[4] Cheertop acknowledges that the formal warning issued to Mr He in May 2020 should not have been issued and have apologised to Mr He. It otherwise denies the claims made by Mr He.

[5] On 29 May 2020 Mr He was advised that his employment would be terminated as a result of the restructuring process and that his employment would end on 19 June 2020.

[6] Mr He raised a personal grievance on 20 July 2020 in relation to the redundancy, and the written warning. The letter also raised a number of other issues, including as to alleged underpayments and a reduction in his hours of work as set out above.

The Authority's investigation

[7] The issues relevant to the Authority's investigation were the subject of discussion between the parties and the Authority at a case management conference held on 15 November 2021. Those issues were identified in directions issued on that same day and were later confirmed at the investigation meeting. No objection to the list of issues was received. As such, the Authority has proceeded on the basis that any unjustified disadvantage relates to the formal warning issued only and that other issues identified by Mr He relating to payments are dealt with independently on the basis an entitlement to the sums claimed.

[8] For the Authority's investigation written witness statements were lodged from Mr He, Alan Chung (Manager, Cheertop), Yuen (Bonnie) Chung (Importing and Compliance, Cheertop), Guan Chung (Accounts and Payroll, Cheertop), Peng (Penny) Fu (Office Manager, Cheertop), and Gong Li (Warehouse Manager, Cheertop).

[9] All witnesses answered questions under oath or affirmation from me and the parties' representatives.

[10] The parties were afforded an opportunity to provide written submissions and I have considered the written submissions lodged. Although Cheertop has raised an issue of alleged overpayment, I am not satisfied that such a claim has been made out.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[12] As permitted by s174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist such as to allow this determination to be issued outside of the three month timeframe required by s 174C(3) of the Act.

The issues

[13] The issues requiring investigation and determination were:

- (a) Whether Mr He was paid correctly and in accordance with the minimum hours he was entitled to under his individual employment agreement (IEA)?
- (b) Whether Mr He's wages were reduced to 80 per-cent without consent or consultation?
- (c) Whether Mr He's hours were reduced by the employer or at the request of Mr He and what was agreed?
- (d) Whether Mr He was disadvantaged by the formal warning that was later withdrawn?
- (e) Was the "no fault" redundancy termination procedurally and substantively justified?
- (f) If Cheertop's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - Wage arrears amounting to \$7,567.51.
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s 123(1)(c)(i) of the Act.
- (g) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr He that contributed to the situation giving rise to Mr He's grievance?

(h) Should either party contribute to the costs of representation of the other party?

Was Mr He paid in accordance with the minimum hours in his IEA?

[14] Mr He claims that he was employed to work a minimum of 40 hours per week but that Cheertop failed to pay him accordingly. He was paid hourly rather than on a salary basis. Cheertop say that Mr He was employed to work between 30 and 40 hours per week and that that is what was recorded in his individual employment agreement.

[15] At the investigation meeting, Mr He confirmed that he was not given a written employment agreement but that there was agreement that he would be employed on a full-time basis working at least 40 hours a week. His evidence is that he was unaware of any issues with his pay at the relevant times and that he only identified the issues later because he did not receive payslips at the time.

[16] Mr He also says that he was not provided payslips during his employment and that when he started work, after making an inquiry, Mr Li told him that he did not need a payslip and that he would be paid correctly. On the basis of the records provided to the Authority, it is apparent that Mr He's pay was not the same each week and that it would vary.

[17] Mr He's evidence was that there was no sign in and sign out process at Cheertop other than that Ms Fu was responsible for, as Mr He put it, "...recording the time that she thought we arrived and left at...". When he asked about discrepancies with his pay, Mr He's evidence was that he was told deductions were made for him being late.

[18] Accepting the evidence of Mr He, it is apparent that he was provided that explanation when he questioned variations in his pay. I do not accept that he was unaware of the variations to his pay.

[19] Mr Li's evidence was that he had told Mr He that he could ask the "boss" for the salary sheet (payslips) if he needed them. He also says that he didn't need them himself, and that he never told Mr He that he could not ask for them. He also gave evidence that Mr He would often arrive late and leave early from work, and that despite always checking his pay after receiving it, that Mr He never complained to him that his pay was inconsistent with his worked hours.

[20] I accept that Mr Li may have indicated to Mr He that he did not need the payslips himself. I also accept Mr Li's evidence that he never told Mr He that he could not ask for them. I do not accept Mr Li's actions were other than just an expression of his views and I find that Mr Li did not tell Mr He that he could not receive payslips from Cheertop.

[21] I do not accept that Mr He could not have asked to be provided payslips and I conclude that he did not ask for them aside from the one occasion he recalled at the commencement of his employment.

[22] If Mr He thought he was being paid less than he was entitled to where he had left work early or arrived late in the relevant week, he consequentially would have known that. In drawing that conclusion, I have considered Mr He's own evidence that he had been told pay discrepancies were due to his being late to work.

[23] The system used by Cheertop to keep track of staff attendance and hours of work was relatively rudimentary. Ms Fu gave evidence that she would keep the relevant records and would record the actual start and finish times, rather than what Mr He described as her recording the times she 'thought' people had worked. Her evidence was also that Mr He knew she recorded the hours of work and that Mr He would often stop by her office on his way out so that she would record the time.

[24] Cheertop produced records, printed from its electronic files, as to Mr He's hours of work. Those documents show the recorded times at which it is said by Cheertop that Mr He started and finished work. In evidence, Ms Fu confirmed that those records were checked by Ms Guan Chung from 'attendance tables' kept by Ms Fu on the bookshelf in her office. Ms Fu's evidence was that she made notes on a calendar in her office recording her own observations and information given to her from others, including Mr Li. Ms Fu also says that everyone knew about the records and could access them.

[25] I am not satisfied that Mr He has shown Cheertop's records to be incorrect, nor has he established that Cheertop failed to provide him with 40 hours of work per week, at least until March 2020. I am also not satisfied that Cheertop discouraged or prevented Mr He from obtaining payslips during his employment.

[26] In conclusion, I find that Mr He was not entitled to receive additional pay for time not worked. As such, Mr He was not entitled to wages for hours he did not work where he did not work for 40 hours. Consistent with his IEA, the records provided to

the Authority show that Mr He would usually work between 30 and 40 hours per week. I find that he was paid for the time worked and that he is not owed outstanding wages relating to this claim.

Were Mr He's wages reduced to 80 per cent without consent or consultation?

[27] There is no question that Mr He's wages were reduced to 80 per cent commencing 26 March 2020. Cheertop, as with many other employers that were faced with unprecedented circumstances relating to the COVID-19 Pandemic, were faced with circumstances that had the potential to significantly impact their business. However, that in of itself does not provide a justification for a unilateral reduction of wages.

[28] Mr He says that Cheertop suspended operations on 26 March 2020 and that he was paid 80 per cent of his normal hourly rate for a period of four weeks. Mr Chung's evidence is that a staff meeting was held on 24 March 2020, at which Mr He was present, where all staff were advised that Cheertop had applied for the COVID 19 wage subsidy and at which Cheertop proposed to apply an 80 per cent wage rate for the period that the business was to close.

[29] Mr Chung says that employees were spoken to in a group and individually, and that Mr He did not raise any concerns with the proposal. He also says that employees were given the option of using their annual leave entitlements to top up the 80 per cent if they chose to. He says Mr He did not elect to do so.

[30] I am satisfied that Mr He did not agree with the proposal that was made. Whilst there may have been some discussion or communication as to Cheertop's proposal, I am not satisfied that Mr He agreed to what was proposed or to the reduction of his wages. There is no written record of the terms and conditions of employment being varied, nor any other written record of the purported agreement.

[31] I find that Mr He is entitled to payment of the difference between the hourly rate he received, \$14.16, and his usual rate of \$17.70, for the relevant period, that period being a total of 80 hours that he could otherwise have worked. I calculate the sum owed as \$3.54 for each of the 80 hours as a total of \$283.20.

[32] I order Cheertop Trading Limited to make payment to Mr He of \$283.20 relating to the period during which his wages were unilaterally reduced to 80 per cent.

Were Mr He's hours of work reduced by Cheertop or at his own request?

[33] Mr He claims that his hours of work were reduced from 40 to 24 hours per week, with a change from five to three days of work per week, on the basis of a unilateral decision made by Cheertop. He says that that occurred without agreement after Mr Li approached him and simply informed him of the decision. He says that the change commenced on Monday 16 March 2020.

[34] Cheertop submits that Mr He's hours of work were reduced at his request as he wanted to engage in further education and/or selling real estate. Mr Li gave evidence that Mr He had approached him asking that he be permitted to leave work two hours earlier everyday so that he could undertake further education. Mr Li says that he told Mr He that that was not possible given his work as a driver performing deliveries, but that Mr He came back to him a few days later asking to work three days rather than five. Mr Li says he agreed with Mr He's proposal after speaking with his boss at the time, Ms Yuen Chung.

[35] There is no written record of the change in the days of work and no variation of an IEA was signed.

[36] Mr He denies requesting the change in hours that was ultimately implemented. I accept that the change was preceded by Mr He making an initial request as to a variation to his hours of work. However, I accept Mr He's evidence and find that that request was declined and that the change that eventuated was imposed upon Mr He rather than being agreed to or requested by him.

[37] I find that Mr He is entitled to payment of 16 hours for which he was not paid relating to March 2020, that being a sum of \$283.20 based on his applicable wage rate at the time of \$17.70.

[38] From 1 April 2020, Mr He was entitled to payment of \$18.90 an hour in accordance with changes to the minimum wage. From 1 April 2020 until 19 June 2020, excluding the period of lockdown which I have already addressed, Mr He's pay records show that he should have received payment for an additional 126.5 hours on the basis of a 40 hours per week. Mr He is entitled to the sum of \$2,390.85 for that period.

[39] I order Cheertop Trading Limited to make payment to Mr He of a total of \$2,674.05 on account of wages owed relating to the unilateral reduction to his hours of work.

Was Mr He unjustifiably disadvantaged by the issuing of the warning?

[40] Cheertop issued Mr He with a written warning by email on 13 May 2020 in relation to his non-attendance at work that same day. The warning recorded that it was Mr Chung's expectation that Mr He was to attend work and that Cheertop's operations were significantly disrupted because of his non-attendance as a result. Mr He claims that he was unjustifiably disadvantaged by Cheertop's actions in issuing the warning.

[41] Section 103A of the Act sets out the relevant test for justification, that being whether the employer's actions, and how the employer acted, were what a reasonable employer could have done in all of the circumstances at the time the dismissal or other action occurred.¹ In applying the test of justification, I must consider the factors listed at s 103A(3) of the Act that, in a non-exhaustive manner, set out procedural considerations.

[42] Following the lockdown in April 2020, Mr He says he returned to work on 29 April 2020 but was subsequently unwell and unable to work. He says he obtained a medical certificate for the period 20 April 2020 to 10 May 2020, following a request from Mr Chung that he do so.

[43] On 11 May 2020 Mr Chung sought consent from Mr He to speak to his doctor prior to his return to work. Mr He did not agree and assumed he would not be permitted to return to work by Mr Chung until he provided consent or the issue was otherwise resolved. However, there was no further explicit communication as to his proposed return to work until the warning was issued.

[44] On 13 May Mr Chung contacted Mr He enquiring about Mr He's absence from work that day. Mr He says he informed Mr Chung he wouldn't be able to work that day given the late notice. Mr He was then, later the same day, issued a formal warning by email for failing to attend work that day. The warning was ultimately withdrawn after Mr He raised a personal grievance.

¹ Employment Relations Act 2000, s 103A(2).

[45] The warning stated that Cheertop were treating the matter as ‘abandonment of employment’, that it was a ‘serious offence’, and included the following statement:

...Treat this email as a warning and any further misconduct or poor performance, we will have to consider a formal dismissal action.

[46] I am satisfied that the issuing of the warning and taking of the disciplinary action disadvantaged Mr He in his employment. Mr Chung provided evidence that the warning was later withdrawn, also repeating an apology for any distress that may have been caused by the issuing of the warning.

[47] I find that the issuing of the warning was procedurally unjustified. I make this finding for reasons including that Cheertop did not take reasonable steps to investigate the matter alleged to have justified the issuing of the warning and that Mr He was not afforded an opportunity to address Cheertop’s concerns prior to the warning being issued.

[48] I am also satisfied that the warning was substantively unjustified having regard to the full circumstances involved. In summary, the warning was issued for non-attendance following reported illness in circumstances where there was some confusion and change in approach by Cheertop as to whether it required further medical evidence before permitting Mr He to return to the workplace.

[49] I accept Mr He’s evidence that he believed that he was to remain off work given that Cheertop had contacted him regarding a requirement to obtain further information from his medical practitioner. Whilst that approach was abandoned, I accept Mr He was genuinely awaiting further contact from Cheertop prior to returning to work. In those circumstances, a fair and reasonable employer could not have issued the warning.

[50] I find that Mr He was unjustifiably disadvantaged in his employment by Cheertop’s actions in issuing him a formal warning.

Was Mr He unjustifiably dismissed?

[51] It is not disputed that Mr He was dismissed from his employment. As such, the onus falls on Cheertop to justify the dismissal. The test of justification under s 103A of the Act applies in context of a dismissal by reason of redundancy.²

² *Grace Team Accounting v Brake* [2014] NZCA 541.

[52] Section 103A of the Act sets out the relevant test for justification, that being whether the employer's actions, and how the employer acted, were what a reasonable employer could have done in all of the circumstances at the time the dismissal or other action occurred.³ In applying the test of justification, I must consider the factors listed at s 103A(3) of the Act that, in a non-exhaustive manner, set out procedural considerations.

[53] The question of justification applies in two parts, to the process adopted by the employer and the substantive justification. In this case those two factors' apply to both the decision to restructure and the selection of Mr He for redundancy.

Procedural justification

[54] Mr Chung posted a message attaching a workplace change proposal to a WeChat group on the afternoon of 14 May 2020. When Mr He did return to work, on 15 May 2020, he says he was called to a staff meeting at which Mr Chung announced that there was to be a restructuring of Cheertop.

[55] Mr He says that he read the proposal at some stage but was unconcerned as the only affected role was the part time driver role. Mr He considered himself as being in the full-time drivers role and as such did not consider he was to be impacted by the restructuring. Mr He says he was not otherwise consulted and the only relevant interaction he had was when Mr Chung asked him whether he had received the proposal while he was eating his lunch one day at work.

[56] I am not satisfied that the steps taken by Cheertop to inform and consult with Mr He about the restructuring proposal were adequate. I summarise the reasons for this as follows:

- (a) Cheertop's approach was fundamentally flawed in that it misinformed itself by classifying Mr He's role as part-time. As a result, Mr He was the only employee considered for redundancy under the proposal, despite there being another employed driver.
- (b) Additionally, because of the characterisation Cheertop used in relation to Mr He's role, I accept he would in any event have been unable to understand that

³ Employment Relations Act 2000, s 103A(2).

his role was one that was potentially to be the subject of restructuring. To that end, Mr He was not afforded a fair and reasonable opportunity to consider and respond to the proposal.

- (c) Cheertop's approach to consultation was wholly inadequate. Whilst a proposal was posted to a WeChat group, I find that a reasonable employer could not have relied upon doing so, without substantially more, as amounting to adequate notice and consultation. The method of communication was wholly inadequate.
- (d) Whilst there was some evidence as to a meeting, and also as to Mr Chung personally reminding Mr He that he should review the proposal, I do not consider that the steps said to have been taken were objectively consistent with what a fair and reasonable employer could have done in the circumstances. They were insufficient to bring the nature of the proposed changes to Mr He's attention.
- (e) For the reasons noted above, Mr He was not in a position to be able to understand what was being proposed, let alone to respond to the substance of the restructuring proposal.

[57] I conclude that the dismissal was procedurally unjustified.

Substantive justification

[58] I am also satisfied that the dismissal was substantively unjustified.

[59] At the investigation meeting, Mr Chung denied any relationship between Mr He's absence from work on 13 May 2020 and the restructuring proposal that was distributed on 14 May 2020.

[60] I do not accept that there was no relationship between the two. At best for Cheertop, I find that the decision to proceed with the restructuring proposal, including ultimately the decision to dismiss Mr He on the purported basis of redundancy, was a matter of mixed motivations.

[61] In reaching the above conclusion, I have considered the evidence relating to the substance of the restructuring proposal. In summary, that evidence shows that there was little or no change to the roles and responsibilities of employees working in other positions, notwithstanding that the restructuring proposal itself suggested such changes

were to be made. The effect of the proposal was simply that Mr He would no longer be employed.

[62] I also find that the decision to dismiss was infected by consideration of Mr He's absence from work the day prior to the proposal being communicated and the attempt to categorise Mr He as being employed in a part-time role. The combined impact was that Mr He was deliberately selected for redundancy rather than there having been a genuine restructuring process resulting in redundancy.

[63] Whilst Cheertop provided some evidence as to impacts on Cheertop's financial position at the time, I find that there was an ulterior motive. Even if I were wrong as to that finding, I would have concluded that the dismissal was without substantive justification given the very limited scope of the proposal and absence of implementation in relation to the other purported changes to the roles performed by other employees.

[64] I conclude that the dismissal was also substantively unjustified.

Is Mr He entitled to remedies?

Lost wages

[65] Mr He claims that he lost four weeks wages as a result of his unjustified dismissal and gave evidence that following his dismissal from Cheertop he found alternate work at a local supermarket commencing on 20 July 2020. Mr He's evidence is that he looked for alternate work and that he successfully obtained such work within a relatively short period of time.

[66] I am satisfied that Mr He took appropriate steps to mitigate his loss. I find that Mr He is entitled to payment of the four weeks claimed. At the time, Mr He was earning \$18.90 per hour based on a 40 hour work week.

[67] I order Cheertop Trading Limited to make payment to Mr He in the amount of \$3,024 of lost wages.

Compensation for humiliation, loss of dignity and injury to feelings

[68] The impact of the dismissal on Mr He was not that which would have been the case in the event of a genuine redundancy. I accept that Mr He felt significant humiliation as a result of the dismissal and being in a position whereby he was, albeit

temporarily, unable to support his family, and additionally as to the burdens and responsibilities he felt based on his culture.

[69] Mr He said that in relation to the dismissal he was at a loss as to how to explain the situation to his family. He experienced significant pressure financially. I also accept that having regard to the circumstances at the time of the dismissal, including the context of lockdowns resulting from the COVID-19 Pandemic, that significant stress resulted from the decision to dismiss given the uncertainty present at the time.

[70] In response to questioning at the investigation meeting, Mr He said that he was shocked by the issuing of the warning and that from that point on he felt like he had become a target. I accept that to have been the case, particularly given the reference to “formal dismissal action” in the warning. Indeed, the very next day a proposal was made by Cheertop that ultimately resulted in the dismissal of Mr He from his employment.

[71] I have considered all of the relevant evidence as to the impact of the dismissal and warning on Mr He. I order that Cheertop Trading Limited make payment to Mr He of a total sum of \$23,500 for humiliation, loss of dignity and injury to feelings on the following basis:

- (a) \$5,000 relating to the formal warning unjustified disadvantage; and
- (b) \$18,500 relating to the unjustified dismissal.

Should any reduction be made to remedies on account of contribution by Mr He?

[72] I am not satisfied that Mr He in any way contributed to the circumstances giving rise to his personal grievances and there is no basis on which any remedies ordered should be reduced.

Costs

[73] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[74] If they are not able to do so and an Authority determination on costs is needed Mr He may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of

that memorandum Cheertop would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Summary of orders

[75] Cheertop Trading Limited is ordered, within 28 days of the date of this determination, to make payment to Mr He of:

- (a) \$283.20 relating to the period during which his wages were unilaterally reduced to 80 per cent;
- (b) \$2,674.05 on account of wages owed relating to the unilateral reduction to his hours of work;
- (c) \$3,024 as compensation for lost wages under s 123(1)(b) of the Act; and
- (d) \$23,500 as compensation for hurt and humiliation under s 123(1)(c)(i) of the Act relating to the unjustified dismissal and disadvantage claims.

Rowan Anderson
Member of the Employment Relations Authority